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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Establishment of a Class A
Television Service

MM Docket No. 00-10

MM Docket No. 99-292

RM-9260

TO: The Commission

**COMMENTS OF
RICHARD AND ANN VERMILLION**

Richard and Ann Vermillion (the "Vermillions"), the permittee¹ of low power television station W57CX, Channel 57, West Palm Beach, Florida, by their attorneys, submit these comments in response to the Commission's Order and Notice of Proposed Rule Making regarding the establishment of a Class A Television service:²

¹On November 18, 1999, the Vermillions filed an application for a license to cover their construction permit, as modified (FCC File No. BLTTL-19991118ABB). In addition, on December 6, 1999, the Vermillions filed an application to assign their construction permit to H&R Production Group, LLC (FCC File No. BALTTL-19991206ACJ). Both applications are pending.

²*In the Matter of Establishment of a Class A Television Service*, Order and Notice of Proposed Rule Making, FCC 00-16 (released January 13, 2000) ("NPRM").

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I. The Public Interest Requires That Stations Recently Commencing Operations Nevertheless Be Granted Class A Status.

The Vermillions have worked laboriously for over a decade to put a low power television station on the air in the West Palm Beach area, but broadcast operations did not commence on Station W57CX until November 9, 1999.³ Since that date, the Vermillions have broadcast at least 18 hours per day on the station, including at least 3 hours per week of locally-produced programming, and have operated the station in full compliance with the Commission's low power television ("LPTV") rules. The programming now available on Station W57CX includes live telecasts of the Miami Heat's professional basketball games, as well as nightly news and sports shows of significant interest to the viewers in the West Palm Beach area.

The Vermillions have therefore fully satisfied the most important elements provided in the Community Broadcasters Protection Act of 1999 ("CBPA") for obtaining Class A status,⁴ save for the fact that their station has not been on the air for the 90-day period ending November 28, 1999.

³In 1988, the Vermillions were granted a construction permit to operate on Channel 53 in West Palm Beach, but it was canceled based on the failure of the Vermillions, who were at the time proceeding *pro se*, to file a timely extension application. A mutually exclusive applicant then filed requesting authority to operate on Channel 53 in nearby Jupiter, Florida, and the Vermillions responded by filing for a construction permit to operate on Channel 55 in West Palm Beach. However, while that application was pending, Channel 55 was subsequently allocated to a full-power station for its DTV operation. The Vermillions then filed an application proposing operation on displacement Channel 57 from a site in West Palm Beach, Florida. That application was granted, but later had to be modified when the Vermillions discovered that they could not construct on that site. Upon securing a suitable site, the Commission granted the Vermillions' modification application, pursuant to which the Vermillions currently operate.

⁴Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), Appendix I, *codified at* 47 U.S.C. § 336(f). The CBPA provides that in order to qualify for a Class A license, the LPTV must have accomplished the following during the 90-day period ending November 28, 1999: (1) broadcast a minimum of 18 hours per day; (2) broadcast an average of 3 hours per week of locally-produced programming within its "market area"; and (3) complied with the FCC's rules regarding low power television stations (the "CBPA Requirements").

But the CBPA states that even if an LPTV operator is unable to comply with all of the CBPA Requirements, the Commission may still grant Class A status if it determines that it is in the “public interest” to do so. CBPA at Section 5008(f)(2)(A)(i). The NPRM seeks comment on the circumstances that would warrant a determination that an applicant who fails to satisfy the CBPA Requirements should nevertheless be considered qualified. NPRM at ¶ 21.

The Vermillions submit that the CBPA is designed for broadcasters such as themselves. In adopting the CBPA, Congress intended to reward operators of low power television stations who have provided “worthwhile services to their communities while under severe license limitations compared to their full-power counterparts” with “primary status as a television broadcaster,” thereby affording them opportunities to enhance their service to the community. CBPA at Section 5008(b)(2) and Section 5008(f)(1)(A)(ii). Therefore, the fact that the Vermillions have not been on the air for that 90-day period should not be fatal to their ability to upgrade to Class A status, because they were granted a construction permit just three weeks before the November 28 deadline. Instead, the circumstances outlined above represent the exact type of instance where the Commission should, pursuant to its authority in the CBPA, permit a station to upgrade to Class A status.

The Commission tacitly acknowledges in the NPRM that the requirement that LPTV operators comply with the regulations for a 90-day period ending November 28, 1999 is not vital. On its own, the Commission raises the question of whether it may continue to accept and approve applications from “qualifying” LPTV stations seeking to convert to Class A status beyond the timeframe established in the CBPA. NPRM at ¶ 9. The use of the modifier “qualifying” indicates that the Commission is inclined to grant Class A status if the station meets the CBPA Requirements, without regard to the length of time that the station had been on the air. The Commission should follow

through on its inclination and find that Class A designation should be accorded stations who, like the Vermillions, comply in every respect with the spirit of the CBPA, but have simply not been on the air for the 90-day period through no fault of their own.

II. Operators On Channels 52-59 Should Be Given An Immediate Opportunity to Seek Channels Below Channel 51 To Continue Operating.

Under current FCC rules, LPTV stations on Channels 52-59 may seek displacement only where there is an actual or potential interference conflict, whereas those on Channels 60-69 may seek replacement channels at any time. Nevertheless, operators on Channels 52-59 will face displacement when those channels are reclaimed for DTV use, and are barred by the CBPA from becoming Class A stations if they cannot secure a replacement channel below Channel 52. CBPA at Section 5008(f)(6)(A). The NPRM therefore asked whether stations on Channels 52-59 should be given an immediate opportunity to seek replacement channels to the extent such channels are still available.

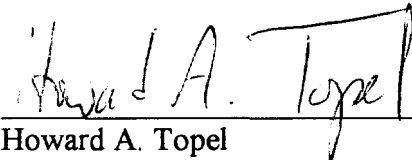
Just by seeking comment, the Commission has recognized the inequity of treating operators broadcasting on Channels 52-59 differently. Fundamental fairness requires that such operators be immediately allowed to seek alternative arrangements because there is a lack of spectrum available in many areas for television broadcast. As demonstrated above, the Vermillions broadcast programming of significant community interest. It therefore behooves the public interest to allow broadcasters such as the Vermillions to begin searching for available spectrum immediately, so that the service provided by smaller broadcasters such as the Vermillions is not lost forever after the DTV transition.

Based on the foregoing, the Vermillions submit that: (1) LPTV stations who have complied in all material respects with the CBPA, except for the length of time on the air requirement, should

nonetheless be granted Class A status; and (2) stations operating on Channels 52-59 should be given an immediate opportunity to seek a channel below Channel 51 to continue existing operations.

Respectfully submitted,

RICHARD AND ANN VERMILLION

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February 10, 2000

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CERTIFICATE OF SERVICE

I, Joan M. Trepal, a secretary at the law firm of Fleischman and Walsh, hereby certify that a copy of the foregoing "Comments of Richard and Ann Vermillion," was served this 10th day of February, 2000, via first class mail, upon the following:

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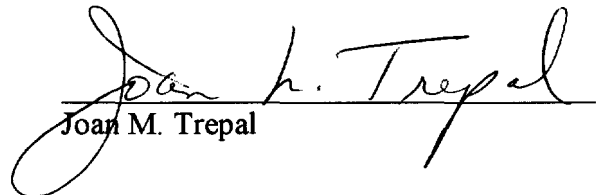
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